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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BESSER,
PETITIONER

-VS-

ROBERT GRAHAM, GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5710

Petrs Reply Brief

ORIGINAL COPY

TRAVERSE TO RESPONDENT'S BRIEF

OR; IN THE ALTERNATE

MOTION TO STRIKE

- I -

Respondent, for some reason of his own, argues only that the Florida Parole Commission is a Constitutional Agency. Such has absolutely no bearing upon the issues presented here unless Respondent is trying to mislead the Court into believing that Parole and Statutory Gain Time are the same.

- II -

Parole is granted by a Parole Commission through some kind of complicated hocus-pocus dealing with prior record, offense committed, and whims of the members.

All Statutory Gain Time is earned by the prisoner for good conduct.

Parole is not required and any prisoner may, as Petitioner did in November, 1978, decline to even consider accepting a parole since parole is in the nature of a legal contract and need not be accepted.

Statutory Gain Time is aimed solely and completely at Mandatory Conditional Release which is a matter of law and must be accepted. A prisoner may not refuse it.

Parole and Mandatory Conditional Release are neither interdependent nor connected in any manner whatsoever, whatever the basis of parole, be it Legislative or Executive, it is not here at issue and bears absolutely no weight in the present matter.

Statutory Gain Time is a creature of the Legislature and must be given when earned. It may not be withheld except for infractions of the Prison Rules. Even then, it may only be taken in amounts fixed by law and a Disiplinary Report and Hearing is indispensible for its taking.

For these reasons, Court need not inquire as to the Florida Parole System since it is not here at issue so it matters not at all whether the Parole System of Florida is Executive or Legislative and that part of the Response should be striken as irrelevant, immaterial and frivilous.

- III -

The question before this Court:

> Where a Statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such Statute to the accused ex post facto?

It is necessary only to consider the following:

> The offense in the instant case bears date of November 3, 1976. The effective Statute (944.27) at that date:
> (1) The Department of Offender Rehabilitation shall grant the following deductions for gain time...
> (A) 5 days per month off the first and second years of the sentence;
> (B) 10 days per month off the third and fourth years of the sentence; and
> (C) 15 days per month off the fifth and all succeeding years of the sentence.

Petitioner was tried to a jury, convicted, and sentenced to a total of seven years imprisonment the 13th day of January, 1977.

On July 1, 1978, a new Statute (944.275) was enacted:

> (1) The Department of Offender Rehabilitation shall grant the following gain time reductions...
> (A) 3 days per month off the first and second years of the sentence;
> (B) 6 days per month off the third and fourth years of the sentence; and
> (C) 9 days per month off the fifth and all succeeding years of the sentence.

Bluntly stated, the New Gain Time Law (944.275) takes away certain benefits guaranteed by 944.27 at the time of sentencing and therefore adds to the penalty contemplated by the law at time of sentencing; - and is, for that reason, ex post facto as it applies to Petitioner.

- IV -

Respondent states that "Curtis is distinguishable" is either in error or is a deliberate mis-statement. Curtis holds:

> "...does not alter the fact that the statute applies a new punitive measure to a crime already consumated to the detriment or material disadvantage of the wrongdoer." State v. Curtis, 363 So.2d 1375 at 1383.

There, the issue was precisely the same with only the amount of time being

different where the Louisiana Department of Corrections was, as here, attempting to apply a Statute reducing gain time from 25 days per month to 15 days per month to a prisoner sentenced prior to the new law. The matter is even more clearly stated:

> (1) Statutory amendment requiring good time for inmates convicted after September 9, 1977, to be computed on basis of 15 days per month rather than the 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date... State ex rel Bickman v. Dees, 367 So.2d 283 at 284.

This, then, is all the issue presented. We are not at all concerned with Parole, Parole Commissions, or what branch of the State Government controls, although since Respondent attempted to argue that the Parole Commission of Florida is constitutionaly fixed in the Executive it is here required that Petitioner point out that the provision governing such Parole Commission and paroles, Article IV 8 (c), Florida Constitution, states only:

> (c) There <u>may be created by law</u> a parole and probation commission with power to supervise persons on probation and to grant paroles...

and Respondent is appearing to present the untenable position that the Executive Branch of the Florida Government can now create laws.

- V -

The Response is wholly unresponsive in that it does not even touch on the matter here at issue. The Response merely presents a rather rambling account of the history of parole in Florida and then cites cases in which gain time was taken for violations of the rules or conditions applicable in those distinct cases. Not one single case cited applies to the issue here.

Court may take Judicial Notice that the Response fails utterly to deny Petitioner's claim; and, therefore, may be held to agree with the position presented by Petitioner;

And, the Response should be stricken as frivilous.

The Writ should be issued.

Respectfully submitted,

William P. Besser

WILLIAM P. BESSER

CERTIFICATE OF SERVICE

I, William P. Besser, did place a true copy of the foregoing Traverse To Response in the United States Mail this 19th day of February, 1980, directed to Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida.

William P. Besser

WILLIAM P. BESSER

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-VS-

ROBERT GRAHAM, GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5710

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI

MOTION TO EXPEDITE

Comes now William P. Besser, Petitioner above named, and presents this Motion to Expidite, showing cause as follows:

1. Petitioner's cause should prevail.
2. The outcome of the present cause will materially affect thousands of persons; all who were convicted of any offenses occurring prior to either July 1, 1978 (the effective date of Florida Statute 944.275) or January 1, 1979 (the date Florida's Department of Corrections decided to implement the cited Statute).
3. Thousands of Florida prisoners are being denied knowledge as to their release date.
4. Hundreds of Florida prisoners are already serving time past their expiration date under Florida Statute 944.27.
5. Every day of delay causes irreparable damage by keeping prisoners past their proper date of release.
6. The cause presents no complicated issues but, simply stated, asks merely if Florida is permitted to apply an ex post facto law.

Respectfully submitted,

William P. Besser
WILLIAM P. BESSER